



## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 275 and 279

[Release No. IA-6384; File No. S7-04-23]

RIN 3235-AM32

### Safeguarding Advisory Client Assets; Reopening of Comment Period

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) is reopening the comment period for its proposal, *Safeguarding Advisory Client Assets*, Release No. IA-6240 (Feb. 15, 2023) (“Proposal”), which proposed a new rule under the Investment Advisers Act of 1940 (“Advisers Act” or “Act”) that would redesignate and amend the current custody rule. In light of the adoption of the private fund adviser audit rule, which generally requires a registered investment adviser to obtain an annual financial statement audit of each private fund it advises in accordance with the audit provision of the current custody rule, reopening the comment period will allow interested persons additional time to assess the proposed amendments to the current custody rule’s audit provision in light of the private fund adviser audit rule.

**DATES:** The comment period for the proposed rule published in the *Federal Register* on March 9, 2023, at 88 FR 14672, is reopened. Comments should be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments:*

- Use the Commission’s internet comment form (<https://www.sec.gov/rules/submitcomments.htm>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-04-23 on the subject line.

*Paper Comments:*

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-04-23. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (<https://www.sec.gov/rules/proposed.shtml>). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at [www.sec.gov](http://www.sec.gov) to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** Janet Jun, Senior Counsel; Christopher Staley, Branch Chief; or Melissa Roverts Harke, Assistant Director, Investment Adviser Regulation Office, Division of Investment Management, (202) 551-6787 or [IArules@sec.gov](mailto:IArules@sec.gov), Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Commission proposed 17 CFR 275.223-1 under the Advisers Act (“rule 223-1” or “safeguarding rule”) on February 15, 2023, to address how advisers safeguard client assets and enhance investor protections.<sup>1</sup> The Proposal also would renumber 17 CFR 275.206(4)-2 (“rule 206(4)-2” or “current custody rule”) to redesignate it as rule 223-1 and amend certain of its provisions, including 17 CFR 275.206(4)-2(b)(4) (“rule 206(4)-2(b)(4)” or “audit provision”). The original comment period for the Proposal closed on May 8, 2023.

Title 17 section 275.206(4)-2(a)(4) of the current custody rule requires the client funds and securities of which an adviser has custody to be verified by actual examination at least once during each calendar year by an independent public accountant. An adviser is deemed to have complied with this annual surprise examination requirement with respect to the accounts of certain pooled investment vehicles,<sup>2</sup> provided that such vehicles’ audited financial statements are obtained and delivered in accordance with the elements of the current custody rule’s audit provision, as set forth in paragraphs (b)(4)(i) through (b)(4)(iii) of the current custody rule. Similar to the current custody rule, the proposed safeguarding rule generally would require an adviser with custody of client assets<sup>3</sup> to obtain a similar annual surprise examination. Again, like the current custody rule, the proposed safeguarding rule also contains an audit provision that, when satisfied, would allow an adviser to be deemed in compliance with the proposed safeguarding rule’s surprise examination requirement with respect to certain client accounts.<sup>4</sup>

While the elements of the proposed safeguarding rule’s audit provision remain largely unchanged from those of the current custody rule, the Proposal includes some key modifications;

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<sup>1</sup> See Safeguarding Advisory Client Assets, Investment Advisers Act Release No. 6240 (Feb. 15, 2023), [88 FR 14672 (Mar. 9, 2023)] (“Safeguarding Advisory Client Assets Release”).

<sup>2</sup> As discussed below, the safeguarding rule would expand the availability of the audit provision from pooled investment vehicle clients to any advisory client entity whose financial statements are able to be audited in accordance with the rule. See proposed 17 CFR 275.223-1(b)(4) (“rule 223-1(b)(4)”).

<sup>3</sup> The safeguarding rule would expand the scope of the current custody rule’s application to cover not only client funds and securities, but also client “assets”, which is defined in the proposed safeguarding rule as, “funds, securities, or other positions held in the client’s account.” See proposed 17 CFR 275.223-1(d)(1).

<sup>4</sup> See proposed rule 223-1(b)(4). See also Safeguarding Advisory Client Assets Release, *supra* footnote 1, at section II.G.1.a. (explaining the elements of the audit provision under the proposed safeguarding rule).

namely, (1) expanding the audit provision’s availability from “pooled investment vehicle” clients to “any other entity”; (2) requiring the audited financial statements of non-U.S. clients to contain information substantially similar to statements prepared in accordance with U.S. GAAP and material differences with U.S. GAAP to be reconciled; and (3) requiring that the adviser or the entity enter into a written agreement with the auditor requiring the auditor to notify the Commission in the event of the auditor’s termination or issuance of a modified opinion.<sup>5</sup>

On August 23, 2023, the Commission adopted new rules designed to protect investors who invest in private funds.<sup>6</sup> Among them was 17 CFR 275.206(4)-10 under the Act (“rule 206(4)-10” or “private fund adviser audit rule”), which generally requires a registered investment adviser to cause each of the private funds it advises (other than a securitized asset fund, as defined in 17 CFR 275.211(h)(1)-1 (“securitized asset fund”)) to undergo a financial statement audit (as defined in 17 CFR 210.1-02(d)) that satisfies the requirements set forth in paragraph (b)(4) of the current custody rule, as well as to deliver each such audited financial statement in accordance with paragraph (c) of the current custody rule.<sup>7</sup>

## **II. Reopening of Comment Period**

Because compliance with the private fund adviser audit rule is predicated in part on an adviser complying with the current custody rule’s audit provision, the proposed modifications to the audit provision as set forth in the proposed safeguarding rule, if adopted, would apply to advisers subject to the private fund adviser audit rule.<sup>8</sup> The Commission is therefore reopening

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<sup>5</sup> Compare rule 206(4)-2(b)(4) with proposed rule 223-1(b)(4). See also Safeguarding Advisory Client Assets Release, *supra* footnote 1, at section II.G.1.a.

<sup>6</sup> See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 6383 (Aug. 23, 2023).

<sup>7</sup> Title 17 section 275.206(4)-10(b) also references the current custody rule’s audit provision, providing an exception from the requirement to obtain an audit for funds and advisers that are not in a control relationship, and instead requiring an adviser to take “all reasonable steps” to cause the private fund (other than a securitized asset fund) to undergo a financial statement audit that satisfies the requirements set forth in paragraph (b)(4) of the current custody rule and to deliver audited financial statements in accordance with paragraph (c) of the current custody rule.

<sup>8</sup> If the Commission adopts the proposed safeguarding rule, the Commission could amend rule 206(4)-10 at that time to redesignate references to rule 206(4)-2 in rule 206(4)-10 as references to rule 223-1.

the comment period for the safeguarding rule proposal so that commenters may consider the proposed modifications to the audit provision in light of rule 206(4)-10. The Commission is reopening the comment period for Release No. IA-6240 *Safeguarding Advisory Client Assets* until **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**By the Commission.**

Dated: August 23, 2023.

**Vanessa A. Countryman,**

*Secretary.*

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